UNITED STATES DISTRICT COURT	
NORTHERN DISTRICT OF NEW YORK	

KENNETH J. PHELAN,

Plaintiff,

-V-

9:11-CV-314 (DNH/DRH)

QUINN, Correctional Officer, Great Meadow Correctional Facility; SWAN, Correctional Officer, Great Meadow Correctional Facility; McDONALD, Correctional Officer, Great Meadow Correctional Facility; WARRINGTON, Correctional Officer, Great Meadow Correctional Facility; WASHER, Sergeant, Great Meadow Correctional Facility; MINAL, Psychologist, Great Meadow Correctional Facility; TORRES, Counselor, Great Meadow Correctional Facility: OWENS, Sergeant, Great Meadow Correctional Facility; GEBO, Correctional Officer, Great Meadow Correctional Facility; FULLER, Correctional Officer, Great Meadow Correctional Facility; KISER, Correctional Officer, Great Meadow Correctional Facility; MURPHY, Correctional Officer, Great Meadow Correctional Facility; and NURSE TED, Nurse, Great Meadow Correctional Facility,

Defendants.

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APPEARANCES:

OF COUNSEL:

KENNETH J. PHELAN
Plaintiff Pro Se
09-A-1183
Five Points Correctional Facility
Caller Box 119
Romulus, NY 14541

HON. ERIC T. SCHNEIDERMAN
Attorney General for the State of
New York
Attorney for Defendants
The Capitol
Albany, NY 12224

ADRIENNE J. KERWIN, ESQ. Ass't Attorney General

DAVID N. HURD United States District Judge

## **DECISION and ORDER**

Plaintiff brought this action pursuant to the Americans with Disabilities Act, 42 U.S.C. § 12101 et seq.. On May 21, 2012, the Honorable David R. Homer, United States Magistrate Judge, advised, by Report-Recommendation, that defendants' motion to dismiss be granted in part and denied and part, and that plaintiff be granted leave to file a second amended complaint. No objections to the Report-Recommendation were filed.

Based upon a careful review of the entire file and the recommendations of the Magistrate Judge, the Report-Recommendation is accepted in whole. <u>See</u> 28 U.S.C. 636(b)(1).

Therefore it is

## ORDERED that:

- 1. Defendants' motion to dismiss is GRANTED in part and DENIED in part;
- 2. Plaintiff's claims for damages against the individual defendants in both their individual and official capacities under the Americans with Disabilities Act are DISMISSED;
- 3. Plaintiff's claims for injunctive relief against the individual defendants in their official capacities REMAIN;
- 4. Plaintiff's remaining claims as to defendants Quinn, Minal, Torres, and Washer are DISMISSED without prejudice to allow amendment as directed below;

- 5. Plaintiff's claim against Nurse Ted is DISMISSED; and
- 6. Plaintiff is granted until July 20, 2012, to file a second amended complaint to assert causes of action for (a) the use of excessive force in violation of his Eighth Amendment right to be free from cruel and unusual punishment, (b) retaliation for filing complaints and grievances in violation of his First Amendment right to seek the redress of grievances, and (c) failing to protect Phelan from harm posed by other inmates in violation of his Eighth Amendment right to be free from cruel and unusual punishment.

IT IS SO ORDERED.

United States District Judge

Dated: June 19, 2012

Utica, New York.